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Criminal Law - Silence as an Admission of Guilt

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ing such recording, in express terms or by necessary implication, in order to protect the rights of the assignee. *Thompson* v. *State,* 201 Pac. 1004 (Okla. 1921). This applies even as against subsequent purchasers without notice. *Barrett* v. *Wedgewood,* 211 Pac. 601, (N.Mex. 1922); *National Live Stock Co.* v. *1st National Bank,* 203 U.S. 296, 27 Sup. Ct. 79, 51 L.Ed. 192 (1906).

Where local statutes require the recording or filing of assignments of chattel mortgages to make them effective, unless so recorded or filed they will be ineffectual as against those intended to be protected. *Buerger Bros. Supply Co.* v. *El Rey Furniture Co.,* 40 P. (2d) 81 (Ariz. 1935). Wisconsin requires the filing of any assignment of a chattel mortgage. WIS. STAT. (1939) Sec. 241.10. An assignment of a chattel mortgage to be valid as such against other than the parties thereto, in the absence of change of possession of the mortgaged article, must be filed according to statute. *Burnett County Abstract Co.* v. *Eau Claire Citizens Loan and Investment Co.,* 216 Wis. 35, 255 N.W. 890 (1934).

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Criminal Law—Silence as an Admission of Guilt.—The defendant was indicted for robbery, being accused of taking four dollars and ten cents from the person of Oscar Glenn by force and against his will. At the county jail, the night after the robbery, the eight or ten prisoners, among whom was the defendant, were lined up for Glenn's inspection. Glenn pointed out the defendant as the one who had robbed him. The defendant remained silent, and made no denial of the accusation that he was the identical person who committed the robbery. Testimony of this fact was admitted at the trial, over the defendant's objection. He was convicted, and appealed, claiming among other things, the admission of the above testimony as error.

Held, that silence in the face of pertinent and direct accusation of crime partakes of the nature of a confession, and is admissible as a circumstance to be considered by the jury as tending to show guilt, even though the person accused is in custody on the charge. *Muse* v. *State,* 196 So. 148 (Ala. 1940).

Failure to reply to a direct accusation of crime, when the person charged is free to do so, is generally held to be an acquiescence in the truth of the accusation. This rule is based on the common knowledge that an innocent man will resent an accusation of crime, and will repel it as a matter of self-preservation and self-defense. *State* v. *Mortensen,* 26 Utah 312, 73 Pac. 562 (1903); *Commonwealth* v. *Martin,* 23 N.E. (2d) 876 (Mass. 1939); *Lett* v. *Commonwealth,* 284 Ky. 267, 144 S.W. (2d) 505 (1940); *People* v. *Smith,* 78 Calif. App. 68, 248 Pac. 261 (1926); *People* v. *Yario,* 346 Ill. 233, 178 N.E. 338 (1931). Silence, under these circumstances, is an admission against interest. *State* v. *Sorge,* 123 N.J.L. 532, 10 A. (2d) 175 (1940). Evasive and equivocal responses are considered tantamount to silence. *Commonwealth* v. *Turza,* 16 A. (2d) 401 (Pa. 1940).

The circumstances surrounding an inculpatory statement must be such as would naturally call for some action or reply by a defendant before they can be treated as an admission by acquiescence. A leading Kentucky case, *Merriweather* v. *Commonwealth,* 118 Ky. 870, 82 S.W. 592 (1904), gives the requisites of the admission of evidence of acquiescence by silence:

(1) Did the person to be bound by the statement hear it? (2) Did he understand it? (3) Did he have an opportunity to express himself concerning it? (4) Was he called upon to act or reply to it?

If the evidence meets these requirements, it is admissible. It is not the accusation itself, but the conduct of the accused that is evidence, and the accusation

is merely admitted to explain the conduct of the accused. *People* v. *Zoffel,* 35 Calif. App. (2d) 215, 95 P. (2d) 160 (1939). His actions when charged are admissible, and if he makes a false explanation, this fact is also admissible. *Diamond* v. *State,* 195 Ind. 298, 144 N.E. 466 (1924). The fact that the person who made the accusatory statements is incompetent to testify, is no bar to their admissibility. *Skidmore* v. *State,* 59 Nev. 320, 92 P. (2d) 979 (1939); *Richards* v *State,* 82 Wis. 172, 51 N.W. 652 (1892).

As a rule, admissions by silence are not considered by the courts to be of great probative force, and are received with great caution. *McCormick* v. *State,* 181 Wis. 261, 194 N.W. 347 (1923). The weight of such statements, or of silence, is a matter for the jury. *People* v. *Sanchez,* 35 Calif. App. (2d) 231, 95 P. (2d) 169 (1939). The evidence is always inadmissible if the accused was not free to counteract the accusations because of fear or duress. Thus, where negroes under arrest in a southern state for murdering a white man were accused of the crime while surrounded by a hostile crowd, their silence was not evidence of an admission of the truth of the accusation. *Merriweather* v. *Commonwealth, supra.*

The authorities differ as to whether the fact that the accused is under arrest is, of itself, sufficient duress to render evidence of his silence when accused, inadmissible. The majority rule, which is in accord with the principal case, is that the fact of arrest is not sufficient of itself to make the accusatory statements inadmissible. *Pinn* v. *Commonwealth,* 166 Va. 727, 186 S.E. 169 (1936); *Anderson* v. *State,* 197 Ark. 600, 124 S.W. (2d) 216 (1939); *People* v. *Smith,* 111 Calif. App. 579, 295 Pac. (1931); *People* v. *Braverman,* 340 Ill. 525, 173 N.E. 55 (1930); *Commonwealth* v. *Saltzman,* 258 Mass. 109, 154 N.E. 562 (1927). But the fact of custody must be taken into account when the question of admissibility is being considered. *People* v. *Kozlowski,* 368 Ill. 124, 13 N.E. (2d) 174 (1938). If a defendant is restrained from speaking either by fear, doubt of his rights, instructions given him by his attorney, or by a reasonable belief that it would be better or safer for him if he kept silent, his silence is not an admission of the charges against him. *People* v. *Kozlowski, supra; Autrey* v. *State,* 94 Fla. 229, 114 So. 244 (1927). But a California court has stated that silence is an admission of the truth of an accusation even though the accused is under arrest and stands mute upon the advice of counsel. *People* v. *Sanchez, supra.*

The minority rule is that a person under arrest is under no duty to deny an accusation made against him, and evidence of his actions when accused is inadmissible. *People* v. *Luft,* 18 N.Y.S. (2d) 880, 259 App. Div. 22 (1940); *Langley* v. *State,* 53 Okla. Cr. 401, 12 P. (2d) 254 (1932); *State* v. *Yochelman,* 107 Conn. 148, 139 Atl. 632 (1927). The reasons given for this rule are that a person under arrest is often restrained by fear, by doubts of his rights, or by a belief that his security will be best promoted by his silence. *O'Hearn* v. *State,* 79 Neb. 513, 113 N.W. 130 (1907). This rule has the support, not only of judicial precedent, but, according to a Missouri decision, it is divinely sanctioned. *State* v. *Hogan,* 252 S.W. 387 (Mo. 1923).

Generally the courts seem reluctant to admit evidence of admissions by silence because they are "not of great probative force" *McCormick* v. *State, supra,* and "viewed in the most favorable light such evidence is weak and infirm . . . and in important cases the rules governing its admission ought to be restricted rather than enlarged." *O'Hearn* v. *State, supra.* Though it has admitted such evidence in the past, the Michigan court recently held that there cannot be a confession of guilt by silence in or out of court. *People* v. *Bigge,* 228 Mich. 417, 285 N.W. 5 (1939).

Wisconsin courts admit evidence of acquiescence in the truth of direct accusations by silence, and follow the majority rule in permitting this evidence even though the accused was under arrest when the inculpatory statement was made. *Hardy* v. *State,* 150 Wis. 176 136 N.W. 638 (1912); *Manna* v. *State,* 179 Wis. 384, 192 N.W. 160 (1922); *McCormick* v. *State, supra.*

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Domestic Relations—Marriage—Annulment for Fraud.—Plaintiff sought an annulment of her marriage on the ground of fraud alleging that the defendant obtained her consent by falsely representing that he was a naturalized American citizen when in fact he was a citizen of Germany. The court granted the annulment under the New York doctrine which holds that any misrepresentation is sufficient to justify an annulment if it is so material that the deceived party would not have consented to the marriage except for such misrepresentation. It was stated that the plaintiff's insistence that her spouse be an American citizen could not be regarded as the expression of a frivolous desire in view of the present-day emphasis on the privilege of American citizenship and the plaintiff's pride in the fact that her family was of American origin. *Laage* v. *Laage,* 9 U.S. L. WEEK 2642 (N.Y. 1941).

This problem was discussed, but not decided in *Kawbata* v. *Kawabata,* 48 N.D. 1160, 189 N.W. 237 (1922), (1923) 2 WIS. L. REV. 117. A minority of the court stated that a man's misrepresentation that he is a citizen of the United States would seem to justify an annulment of his marriage to a United States citizen whose citizenship in America is affected by marriage to a foreigner.

The extent to which some courts, led by New York in *Di Lorenzo* v. *Di Lorenzo,* 174 N.Y. 467, 67 N.E. 63 (1903), had relaxed the older and more strict views as to the degree or kind of fraud which would be sufficient to annul the marriage contract was indicated in 23 MARQ. L. REV. 147, noting *Nocenti* v. *Ruberti,* 3 Atl. (2d) 128 (N.J. 1939), where an annulment was granted because the man misrepresented that he would marry the plaintiff according to the rites of the Roman Catholic Church within a year after their marriage by a civil ceremony.

More recently the broad New York rule has been applied to annul a marriage where the bridegroom stated immediately following the ceremony that he believed the marriage to have been mistakenly performed and then, within fifteen minutes after leaving the justice of the peace, departed from his bride and was not heard from again. The court said that fraud sufficient to annul any civil contract will justify the annulment of a marriage, especially where the marriage has not been consummated "and has not ripened fully into the complications of a public status involving considerations of questions of public policy." *Lewine* v. *Lewine,* 170 Misc. 120, 9 N.Y. S. (2d) 869 (1938).

Although mere sterility is not sufficient to justify an annulment, a New York court has annulled for fraud a marriage where the husband had failed to disclose a physical infirmity which made him sterile even though he had not known of his sterility at the time of the marriage. Because of the known infirmity he was held to have been put on inquiry which, if pursued by a physical examination, would have disclosed the sterility. Since he knew his prospective wife wanted a family, his concealment of the known infirmity was held to be a fraud sufficient to annul the marriage which but for the concealment would not have been contracted. *Williams* v. *Williams,* 11 N.Y. S. (2d) 611 (1939).